

APPEAL NO. 021891
FILED SEPTEMBER 13, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 13, 2002. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (claimant) was injured in the course and scope of his employment; that the date of injury under Section 408.007 was _____; that the respondent/cross-appellant (carrier) is relieved of liability under Section 409.002 because the claimant failed to timely notify his employer of his injury under Section 409.001; that the claimant did not sustain a compensable repetitive trauma injury (due to failing to timely report the injury as a work-related injury to the employer); that the carrier is not relieved of liability under Section 409.004 because the claimant timely filed a claim for compensation with the Texas Workers' Compensation Commission (Commission) within one year of the injury as required by Section 409.003; and that, because the claimant did not sustain a compensable injury, he has not had disability as defined by Section 401.011(16).

The claimant appealed the hearing officer's determinations that the date of injury was _____; that the carrier is relieved of liability under Section 409.002 because he failed to timely notify his employer of his injury under Section 409.001; that the claimant did not sustain a compensable repetitive trauma injury; and that he has not had disability. The carrier appealed the hearing officer's determinations that the claimant sustained an injury in the course and scope of his employment; that, due to the claimed injury, the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage from January 25, 2002, through the date of the CCH; and that the carrier is not relieved of liability under Section 409.004 because the claimant timely filed a claim for compensation with the Commission within one year of the injury as required by Section 409.003.

DECISION

The hearing officer's decision is affirmed in part and reversed in rendered in part.

The claimant claimed a repetitive trauma injury, which is defined as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Section 401.011(36). The hearing officer was persuaded by the claimant's testimony and by the medical reports that the claimant sustained a repetitive trauma injury to his left ulnar nerve and that due to that injury he was unable to obtain and retain employment at wages equivalent to his preinjury wage from January 25, 2002, through the date of the CCH. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's determinations that the claimant

sustained an injury in the course and scope of his employment and that due to the claimed injury the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage from January 25, 2002, through the date of the CCH are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Those determinations are affirmed.

An occupational disease includes a repetitive trauma injury. Section 401.011(34). Section 408.007 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. The claimant contends that the date of injury was _____. The hearing officer determined that the claimant knew or should have known that his injury may be related to his employment on or about _____, and that the date of injury was, therefore, _____. Conflicting evidence was presented on this issue. We conclude that the hearing officer's determination on the date of injury is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, supra. The hearing officer's determination on the date of injury is affirmed.

Section 409.001(a) provides that, for an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. The claimant contends that he spoke to his supervisor about his injury on _____, and that is when the employer had actual knowledge of his injury because a previous employee had a repetitive trauma injury from operating the employer's machines. The claimant acknowledged that he did not tell his supervisor in _____ that he was claiming a work-related injury. The claimant's supervisor testified that the claimant first reported that he was claiming a work-related injury on January 22, 2002. The hearing officer determined that the claimant did not report his injury as a work-related injury until January 22, 2002, and that the claimant's delay in reporting his injury to his employer until January 22, 2002, was not reasonable. The hearing officer concluded that the carrier is relieved of liability under Section 409.002 because the claimant failed to timely notify his employer of his injury under Section 409.001. We conclude that the hearing officer's determination that the claimant failed to timely notify his employer of his injury is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, supra. The hearing officer's determination on the timely notice issue is affirmed.

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Because the claimant did not timely notify his employer of his injury, the claimant did not have a compensable injury as defined by Section 401.011(10), and thus the hearing officer did not err in determining that the claimant has not had disability as defined by Section 401.011(16). The hearing officer's determination that the

claimant has not had disability is affirmed. See Texas Workers' Compensation Commission Appeal No. 011685, decided August 24, 2001.

Section 409.003 provides that if an injury is an occupational disease, an employee or a person acting on the employee's behalf shall file with the Commission a claim for compensation for an injury not later than one year after the date on which the employee knew or should have known the disease was related to the employment. The hearing officer erred in finding that the claimant filed his Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) with the Commission on January 22, 2002, because the claimant's TWCC-41 is dated February 8, 2002, and, according to the Commission's date-received stamp, it was not filed with the Commission until March 20, 2002. The claimant's attorney noted in closing argument that the TWCC-41 was filed on March 20, 2002. We reverse the hearing officer's Finding of Fact No. 9 in which the hearing officer found that the claimant filed his TWCC-41 with the Commission on January 22, 2002, and we render a decision that the claimant filed his TWCC-41 with the Commission on March 20, 2002.

The hearing officer erred in determining that the carrier is not relieved of liability under Section 409.004 because the claimant timely filed a claim for compensation with the Commission within one year of the injury as required by Section 409.003. Since the hearing officer determined that the date of injury was _____, and since the claimant did not file his TWCC-41 with the Commission until March 20, 2002, the TWCC-41 was not timely filed with the Commission within the one-year period and consequently the carrier is relieved of liability under Section 409.004.

In Finding of Fact No. 8, the hearing officer found that "Claimant did not have good cause for failing to notify the Employer of his injury within 30 days after _____." No good cause finding was made with regard to filing of the TWCC-41. We do not understand Finding of Fact No. 8 because the hearing officer determined that the date of injury, the date the claimant knew or should have known that the disease may be related to his employment, was on or about _____, and thus the claimant had 30 days from that date to report his injury to his employer. It may be that the hearing officer intended to find that the claimant had good cause for not reporting his injury to his employer until _____. However, the hearing officer also determined that the claimant's delay in reporting his injury to his employer until January 22, 2002, was not reasonable, which appears to indicate that the hearing officer was not persuaded that good cause, if established for any period, continued until the date the injury was reported to the employer on January 22, 2002. Although a finding of good cause was not made with regard to the delay in filing the TWCC-41, it appears from the hearing officer's discussion of the evidence that he was not persuaded that good cause for failing to file the TWCC-41 extended beyond _____. As noted, the TWCC-41 was not filed until March 20, 2002. See Texas Workers' Compensation Commission Appeal No. 93711, decided September 10, 1993, for a discussion on good cause.

We affirm the hearing officer's determinations that the claimant was injured in the course and scope of his employment; that due to the claimed injury, the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage from January 25, 2002, through the date of the CCH; that the date of injury was _____; that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to timely notify his employer of his injury under Section 409.001; that the claimant did not sustain a compensable repetitive trauma injury; and that, because the claimant did not sustain a compensable injury, he has not had disability. We reverse the hearing officer's determination that the claimant filed his TWCC-41 with the Commission on January 22, 2002, and we render a decision that the claimant filed his TWCC-41 with the Commission on March 20, 2002. We reverse the hearing officer's determination that the carrier is not relieved of liability under Section 409.004 and we render a decision that the carrier is relieved of liability under Section 409.004 because the claimant did not timely file his TWCC-41 with the Commission under Section 409.003.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750
COMMODORE 1
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge